

No. 10607

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LESTER ARTHUR CORSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal from a judgment of one year in jail after conviction of count two of an information charging violation of "Ration Order 5C as amended," allegedly issued "pursuant to the provisions of the Second War Powers Act" (Pub. L. (4) 507, 77th Congress, 2nd Sess., March 27, 1942).

The information was verified by Jonah Taylor, investigator for the Office of Price Administrator. [R. 5.] Thereafter demurrers to the motion to cross the information were filed. [R. 6. 12.] The motions were overruled and exception allowed. [R. 15.]

The defendant renewed his motion and moved to set aside on the ground that it was not filed in accordance with Section 591, U. S. C. A., and Section 995 of the

Penal Code of the State of California, and on the ground that there was no reasonable and probable cause, also that the Fifth Amendment to the Constitution of the United States was violated. The motion was denied and exception allowed [R. 16]; then the case was called before Judge Benjamin Harrison on preliminary motions. Ration Order 5C has already been amended 73 times. [R. 67.] At the outset of the trial appellant again objected on the ground that the defendant was being prosecuted for a violation of the Second War Powers Act, which contained no penal provision, but the allegation was a violation of an OPA directive and that there was no authority to subdelegate power to issue directives which would become violations of law. Objection was further made [R. 68] to the creation of crime by an administrator. [R. 130.] There was no priority-created crime by executive order [R. 131]; exception duly noted.

Two investigators of the Office of Price Administration, John E. Foster and Jonah Taylor, arrested appellant without a warrant on this misdemeanor charge (for which appellant was later sentenced to one year in the County Jail).

Foster solicited a man named Edgar E. Thompson on September 2, 1943. [R. 70.] Thompson had had a previous criminal record and was an ex-convict. [R. 78.] The investigator met Thompson twice at Manhattan Beach. At the time they arrested him, he had some ration stamps. They were all kinds; TT's, D's and B's. [R. 79.] White was not taken into custody. He was released

almost immediately. Thompson was taken to his home in Long Beach and from his home he was brought to the Federal Building in Los Angeles. [R. 79.] The officers then made an arrangement with Thompson, who said he had recently married and wanted to be with his wife to follow Corson that afternoon. The officers rode with Thompson and Thompson drove out to this parking lot where he had sold an automobile and where his automobile was on the parking lot. Thompson met the appellant on two occasions. The officers asserted that they had searched Thompson before he went onto the lot. They searched him again on his return and he had the TT stamps which were introduced in evidence. They said they were 140 feet away from where Thompson parked the car and entered the lot but not more than 115 and 125 feet away from where the transaction allegedly took place [R. 86.] Thompson received a sentence of only 90 days, but not for this alleged transaction. [R. 87.]

From the time that Thompson left on the first trip to go to 8801 Sunset Boulevard he was out of the sight of the officers until Corson was arrested. He went in one place to eat and the officers went into another. The officers claimed to have used binoculars. [R. 89.] They claimed to have seen something pass from one man to another. Appellant assigns the following errors in the record:

I.

**Count Two of the Information Fails to State an
Offense of the Laws of the United States.**

Count II of the information is as follows:

Count Two.

That on or about the 2nd day of September, 1943, in the County of Los Angeles, State of California, in the district aforesaid, and in the Central Division thereof, and within the jurisdiction of this Court, Lester Arthur Corson did knowingly, wilfully and unlawfully assign and transfer to Edgar E. Thompson eight hundred (800) Type "TT" gasoline ration coupons in a manner other than in accordance with the provisions of Ration Order 5C (7 Fed. Reg. 9135), as amended, in violation of the provisions of Section 13494.8177 (b) of said Ration Order 5C, as amended, issued pursuant to the provisions of the Second War Powers Act (Pub. L. (4) 507, 77th Cong. 2d Sess., March 27, 1942), contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [R. 4.]

It will be seen that the information is not in the language of the statute nor is it in the language of the regulation. There is no charging parts in the information so that the accused may know what statutes and regulations he is violating.

Both a court and an accused are entitled to know what law and what portion of a law they are charged with violating and what regulation and what portion of a regulation they are violating. Simply to refer to a statute by a number and reference which even a lawyer has difficulty in finding and to refer a regulation, not stating what the regulation is, does not sufficiently inform the Court and

the accused of the nature and cause of the accusation to comply with the Sixth Amendment to the Constitution of the United States, to state a public offense against the laws of the United States. The information does not even set out the forbidden conduct in the regulation, nor does it set forth any regulation. Such an information is entirely insufficient.

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588,
Fed. Case 14455, 2 Paine 451;

U. S. v. Simmons, 96 U. S. 360, 24 L. Ed. 819;

U. S. v. Hess, 124 U. S. 483, 31 L. Ed. 516;

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U. S. v. Louisville & N. R. Co., 165 Fed. 936;
Hall v. U. S., 89 Fed. (2d) 578;
Harris v. U. S., 104 Fed. (2d) 41.

II.

The Information Fails to Charge an Offense Against the Laws of the United States in That Public Law No. 507, 77th Congress, March 27, 1942, Fails to Contain Any Penal Provisions, Except to Unrelated Matters.

There are no penal provisions in the Second War Powers Act of March 27, 1942, relating to the matters herein charged.

It is elementary hornbook law that in every crime there must be a crime defined and punishment.

U. S. v. Seibert, 2 F. (2d) 80.

Section 15 of the Penal Code of California defines a crime to be an act committed or omitted in violation of a law forbidding or commanding it and to which is annexed, upon conviction, either of the following punishments: (Listing.)

Statutes creating crimes are to be strictly construed and may not be held to extend to cases not covered by the words used.

U. S. v. Resnick, 299 U. S. 207, 81 L. Ed. 127.

Punishment is as necessary to constitute a crime as definition.

People v. McNulty, 93 Cal. 427;

In re Ellsworth, 165 Cal. 677.

The motions to quash and dismiss the information, the demurrer to the information and the motion in arrest of judgment should therefore have been granted on this ground.

III.

The Attempt to Create a Crime by a Rationing Order 5C Is an Unconstitutional Attempt to Create a Crime by Executive Order.

The information charges a violation of the provisions of Section 1394.8177 (b) of Ration Order 5C as amended. This order cannot make criminal that which the statute itself does not make criminal. It is not the violation of a regulation that constitutes a crime, but of a statute making it a crime to violate some regulation pursuant to it.

In so far as this case is an attempt to create a crime by executive order it is unconstitutional and violative of Article I, Sections 1 and 8, of the Constitution of the United States.

Constitution of the United States, Art. I, Secs.
1, 8.

A regulation cannot make its violation a criminal offense in the absence of a statute making it an offense.

U. S. v. Eaton, 144 U. S. 677, 36 L. Ed. 591;

Interstate Commerce Comm. v. Cincinnati N. O. & T. P. R. Co., 167 U. S. 479, 42 L. Ed. 243.

The District Court erred in giving the following instruction:

"Any person who wilfully performs any act prohibited or wilfully fails to perform any act required by any provisions of the Second War Powers Act, or any rule, regulation or order issued thereunder, shall be guilty of an offense.

"Ration Order 5C is a rule, regulation or order issued under and pursuant to the authority contained in the Second War Powers Act."

This instruction was erroneous because the Second War Powers Act did not require the performance or forbid the performance of any act charged in this information, nor was there any rule, regulation or order issued thereunder, or authorized to be issued under the Second War Powers Act, nor did the Act make the performance or non-performance of such act or such regulation an offense.

Hence the instruction as to a matter not the law was erroneous.

The District Court therefore erred in overruling each of the grounds of demurrer, motions to quash and motions in arrest of judgment.

IV.

The Second War Powers Act Fails to Define the Acts Herein as Constituting a Crime.

Any attempt to create a crime by regulations or orders would violate the Fifth Amendment to the Constitution of the United States.

A penal statute must itself define a crime. Unless the statute itself contains all the elements of the offense so clearly that men of common understanding may know the forbidden conduct the statute would violate the Fifth Amendment to the Constitution of the United States.

U. S. v. Reese, 92 U. S. 214;

Connally v. General Construction Co., 269 U. S. 385, 70 L. Ed. 322.

Lanzetti v. New Jersey.

But here the statute itself contains no such provisions. Hence no crime is charged.

Hence it would be violative of due process of law guaranteed by the Fifth Amendment, in that anything done was arbitrary and capricious and without any law.

U. S. v. 11,150 Pounds of Butter, 195 Fed. 657.

V.

The Trial Court Erred in Failing to Direct the Verdict.

As to count two of the information, the evidence shows that the defendant was arrested by two OPA investigators on the misdemeanor charge herein, that at the time of the arrest they were not officers authorized by the United States of America to make arrests, nor was the charge a felony. The evidence further shows that Foster and Taylor took a man into custody named Ernest E. Thompson, who was an ex-convict. [R. 78.] They made arrangements with Thompson to go to the place of business of Lester Arthur Corson on Sunset Boulevard. Corson was a used car dealer who had known Thompson and paid him commissions for selling automobiles for Corson. [R. 114.] A day or two before Corson's arrest Thompson had been in Corson's place of business, and Corson had told him either to take his car back or give Corson the bill of sale on it. On the afternoon of September 2, 1943, Thompson went to Corson's place of business. The two OPA men, Foster and Taylor, said they searched Thompson and his wife before he went over.

They followed him again when he went over to see Corson a second time, at around 6:30 p. m. Corson testified that Thompson endeavored to sell him the used car he was driving for \$1900, and that they were discussing the matter; that Thompson walked over to the other automobile he had sold to Corson a few days before that and at that time the OPA men popped up and arrested him

and charged him with transferring coupons to Thompson illegally. [R. 116.] At no time did the officers *ever find or actually see any coupons* in the possession of Corson. There were elements of a manufactured case of the type which the law abhors.

Thompson received a very light sentence of 90 days in jail upon his plea of guilty to five counts of violation of the ration laws growing out of the possession of other coupons in no way related to the appellant. [R. 112.] With this evidence the Court should have quashed the warrant on the ground that the OPA men had no right to make the arrest and that there was no probable cause. Furthermore, the Court should have directed the verdict.

The Government did not present any evidence before the first motion for directed verdict [R. 107] to show that the defendant had violated any rule or regulation or that he was in unlawful possession of the stamps, nor did they ever show that he assigned or transferred any stamps. The words assign and transfer are defined as follows:

“To ‘transfer and assign’ in law is the conveyance of right, title or property, either real or personal, from one person to another.”

Curtin v. Kozwalsky, 145 Cal. 431, 435:

North Texas National Bank v. Thompson, 23 S. W. (2d) 494;

Hoag v. Mendenhall, 19 Minn. 335, 336.

But since the words "transfer and assign" have legal meanings that connote a change of title and legal ownership, and there could be no transfer and assignment without the ability to do so legally, here there was none. Therefore, since the subject matter charged could not be subject to transfer and assignment, and since the subject shows no effort to transfer and assign under a purported legal authority, the evidence is entirely insufficient.

The Government failed to prove that the defendant actually assigned and transferred any stamps. The case rests on the pure conjecture of the two OPA investigators that they searched Thompson before he went over to the lot and that afterwards he came back and he had the stamps in his possession. The officers further claimed that they saw papers pass from Corson to Thompson. [R. 103.] They couldn't state what were in the papers.

When Thompson was first arrested there was some discussion about his wanting to do everything he could to help, but that he didn't want to leave his wife alone. It is respectfully submitted this evidence is insufficient to overcome the presumption of innocence and is not substantial evidence to justify the verdict. Motions for directed verdict at the close of the government's case and the entire case were denied, exceptions being taken. [R. 107, 122.]

VI.

**The Defendant's Rights Under the Fifth Amendment
of the Constitution of the United States Were
Violated.**

The defendant moved to set aside the information on the ground that it was not filed in accordance with Section 591, United States Codes, Annotated, and Section 995 of the Penal Code of California, and on the ground that there was no reasonable and probable cause. Also, that the Fifth Amendment to the Constitution of the United States was violated. These motions were overruled and exceptions allowed. [R. 52.]

The defendant was arrested by Jonah Taylor and John E. Foster. The charge was a misdemeanor. Thereafter Jonah Taylor swore to a complaint and set forth in his complaint that he is an employee of the United States Government, to wit, an investigator for the Office of Price Administration, an agency of the United States Government; that in the course of his duty as investigator for the Office of Price Administration, he made an investigation of the matters set forth and mentioned in the information against Lester Arthur Corson, and that he knows the contents of the information and that the matters set forth therein are true of his own knowledge. The defendant moved to set aside the information for want of reasonable and probable cause. There was nothing in the verification that showed any reasonable or probable cause, and the defendant was entitled to have the Court grant the motion pursuant to Section 591 of the U. S. C. A. and Section 995 of the Penal Code of the State of California. It was the duty of the Court to take evidence as to whether there was probable cause. It was also his duty to set aside the information and quash the warrant when the defendant had been illegally arrested.

VII.

The Defendant Was Denied Due Process of Law Because of the Large Number of Changes of Regulations Which Neither He nor the Jury Knew, nor Which Were Contained in the Charges Against Him.

When the case was first called, the regulation 5C of the Office of Price Administration had been amended seventy-three times. [R. 67.]

When the trial was called the regulations had been amended more than a hundred times.

The District Court Erred in Instruction Given.

The only instruction given by the Court on what ration order 5C says or does not say is as follows:

“Section 1394.8177 of Ration Order 5C reads in part:

‘(b) No person shall transfer or assign and no person shall accept a transfer or assignment of any coupon book or any bulk, inventory or other coupon (whether or not such book was issued as a ration or as part of a ration book) or other evidence, except in accordance with the provisions of Ration Order No. 5C.’ ”

And again the Court gave the jury instructions as follows:

“It is incumbent upon the Government to prove beyond a reasonable doubt that the defendant on or about September 2, 1943, in the County of Los Angeles did knowingly, wilfully, and unlawfully assign and transfer 800 type TT gasoline ration coupons, that they were valid coupons issued by a rationing

board of the United States, and that he transferred them to Edgar E. Thompson, in a manner other than in accordance with Ration Order 5C, as amended, and as again amended. The Government must prove the charges strictly as made. If you have a reasonable doubt as to the proof of any of these elements, or if the Government has failed to prove any of them, beyond a reasonable doubt, you must acquit the defendant of Count Two of the Information."

Neither of these instructions told the jury what Ration Order 5C provided nor the manner in which Ration Order 5C provided that stamps could be assigned or transferred, and what Ration Order 5C allows or forbids [R. 128], (nor what act is required by the Second War Powers Act). Nor is there anything in the testimony in the case wherein the Government offered any regulations to the jury by which the jury could determine whether the stamps were or were not transferred in accordance with the provisions of Ration Code 5C as amended more than a hundred times. It is respectfully submitted that such proceedings deny to a citizen of the United States of America due process of law guaranteed by the Fifth Amendment to the Constitution.

Wherefore, we pray that the judgment be reversed.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant.

